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## 2009 APPELLATE CASES FROM THE DEFENSE PERSPECTIVE

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## **2009 APPELLATE CASES –**

### **FROM A DEFENSE PERSPECTIVE**

**By James P. Cleary, Deputy Legal Defender, Maricopa County,  
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#### **I. Substantive Criminal Law**

##### **State v. Schmidt, 220 Ariz. 563, 208 P.3d 214 (2009)**

The court reviewed an aggravated sentence imposed for attempted sexual abuse, a dangerous crime against children. The trial court imposed an aggravated sentence based solely on the “catch-all” aggravator of A.R.S. 13-702 (D). No other enumerated aggravators were found by the trial court to justify an aggravated sentence.

The court held that the catch-all aggravator of A.R.S. 13-702 (D) was patently vague and thus unconstitutional under the due process clause of the federal Constitution. The sentence was vacated and the case remanded for resentencing. The court noted though that if other enumerated aggravating factors in A.R.S. 13-702 (D) were found, the trial court would not be precluded from considering other factors under the catch-all aggravator. Its holding of unconstitutionality was limited to the sole use of the catch-all aggravator to aggravate a sentence.

##### **State v. Zaragoza, 221 Ariz. 49, 209 P.3d 629 (2009)**

The court reviewed the recurring issue of the meaning of “actual physical control” in A.R.S. 13-1381 (A) (1). The court recognized that courts had crafted inconsistent jury instructions on the meaning of the phrase. It held that the jury instruction in the case was proper. However, in order to avoid confusion in the future it determined that a modified form of the RAJI should be used in future actual physical control prosecutions. It listed 13 factors to instruct the jury upon with appropriate cautionary language.

### **State v. Moore, 222 Ariz. 1, 213 P.3d 150 (2009)**

The court upheld defendant's convictions for one count of premeditated murder and two counts of felony murder. However, it reversed his convictions for two counts of premeditated murder due to error in the jury instruction for premeditation.

The court held that the instruction for premeditation using the phrase "proof of actual reflection is not required" was an erroneous instruction under its holding in **State v. Thompson**, 204 Ariz. 471, 480, 65 P.3d 420, 429 (2003). Under the facts, the error was not harmless and thus reversal of the premeditated murder convictions was required.

### **State v. Payne, 2009 WL 2211036 (CA 2 2009)**

The court addressed the propriety of a Pima County Ordinance imposing a \$1,000 prosecution "fee" on individuals convicted of a felony in Pima County. The county argued that the "fee" was authorized by a county ordinance.

The court reviewed the legislative history of the statutes empowering the county to enact ordinances authorizing the imposition of a "fee". It concluded that while Arizona statutes, A.R.S. 11-251.05 and 11-251.08, did authorize the imposition of fees for county services, it concluded that the ordinance "fee" at issue was more of a fine and thus not statutorily authorized. It believed that the imposition of the "fee" only upon convicted felons transformed the "fee" into a fine or punishment which was not authorized by the enabling state statutes. It held that the conclusion that the "fee" was really a punishment or fine was consistent with American legal tradition that does not require defendants to reimburse the government for the costs of their criminal investigations or prosecutions.

### **Carrillo v. Houser, 222 Ariz. 356, 214 P.3d 444 (CA 1 2009)**

The court addressed the issue of consent for a blood draw under the Implied Consent Law, A.R.S. 28-1321. The issue arose in a prosecution for driving under the influence where the defendant did not expressly consent to a blood draw after arrest but was inferred by the trial court from a mere failure to refuse.

The court on review found that the statutes required "express" consent to a blood test after arrest. It also found that the statutes required that if there was no "express" consent then the driver would be subject to civil sanctions and allowed the state to secure a search warrant for the blood draw. The court concluded that the trial court erred when it inferred consent from a failure to refuse. The court remanded for further proceedings to

determine whether the defendant consented to a blood draw in accordance with the Implied Consent Law.

**State v. Jones, 222 Ariz. 555, 218 P.3d 1012 (CA 1 2009)**

The court reviewed the trial court's dismissal of charges filed under A.R.S. 39-161. The charges alleged that the defendant falsely verified that signatures on nomination petitions were made in his presence.

The court found that an instrument that contains an untrue statement falls within the prohibitions of A.R.S. 39-161 only if the instrument is counterfeit, inauthentic or otherwise not genuine. Even assuming the defendant falsely verified the petitions, he did not violate the statute because his verifications did not render the petitions not genuine. The court determined the statutory intent was to insure that an instrument presented for filing be genuine, authentic and not counterfeit.

**State v. Lockwood, 222 Ariz. 551, 218 P.3d 1008 (CA 2 2009)**

The court reviewed defendant's conviction for abandonment or concealment of a human body under A.R.S. 13-2926. The evidence in support of conviction was that law enforcement agents, acting upon a tip, discovered the remains of a human fetus buried in the backyard of defendant's residence. The defendant admitted burying the fetus there the month previously after a miscarriage. The state had no proof the remains had resulted from a live birth.

The court concluded that the statute was intended to punish the abandonment of human remains. It concluded that precedent had established a distinction in Arizona case law between a fetus and a human resulting from a live birth. It held that the statute did not apply to fetal remains. The conviction was reversed.

**Trombi v. Donahoe, Ariz. , 222 P.3d 284 (CA 1 2009)**

The court reviewed contempt findings by the trial court for failure of the county sheriff to transport prisoners to scheduled court appearances on time.

The court found that the court had the authority to direct the sheriff to transport prisoners to court in a timely fashion under A.R.S. 11-441(A) (4) (Supp. 2008). However, it found that the imposition of fines for non-compliance on individual occasions required a finding of willfulness beyond a reasonable doubt. This did not occur in compliance with Ariz. R. Crim. Pro. 33 and the criminal contempt citations were set aside.

**State v. Paredes-Solano, Ariz. , 222 P.3d 900 (CA 2 2009)**

The court reviewed defendant's convictions for two counts of sexual exploitation of a minor under A.R.S. 13-3553. At issue were whether the indictment was duplicitous and whether the jury instructions on sexual exploitation resulted in a duplicitous charge.

The court found that the statute did create separate offenses as evidenced by the legislature's stated purposes in enacting 13-3553. The statute defining sexual exploitation of a minor lists a number of distinct acts, grouped together in separate subsections by the type of harm they cause. Defendant was charged with six separate acts under two separate subsections aimed at prohibiting certain types of harms. The indictment was duplicitous on its face as multiple offenses were contained within a single count.

The court concluded that the indictment, jury instructions and arguments of the state's counsel allowed for jury conviction by less than a unanimous verdict as some jurors may have found some acts and others other acts without unanimity on a single act. This violated defendant's right to a unanimous verdict. Thus, the convictions were reversed.

**II. Procedural Criminal Law**

**Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210 (2009)**

The court reviewed the trial court's denial of an evidentiary hearing requested by the defendant. The defendant sought to challenge the sufficiency of an alleged sentencing aggravator in a capital case. The trial court ruled the defendant had not shown sufficient facts to prove probable cause did not exist

The court reversed the trial court's ruling. It held that Ariz. R. Crim. Pro. 13.5 (c), and its accompanying comments on its adoption, clearly intended that a capital defendant be allowed to request a determination of probable cause as to alleged aggravators if the defense deems it appropriate. The court further concluded that the proper procedure to follow was that outlined in Rule 5 of the Ariz. R. Crim. Pro. listing the burdens and evidentiary standards in a preliminary hearing.



**State v. Osborn, 220 Ariz. 174, 204 P.3d 432 (CA 1 2009)**

The court reviewed a defendant's stipulation of a prior felony conviction in a trial where he was charged with misconduct involving weapons and possession of dangerous drugs. The purpose of the stipulation was to avoid having the jury learn of his prior felony during the guilt phase for the charges. The issue for the court was whether the stipulation was sufficient under Ariz. R. Crim. Pro. 17.2 to allow for enhanced sentencing with a prior conviction for his ultimate conviction on the possession of dangerous drugs charge.

The court held the colloquy between the court and the defendant as to the stipulation, while effective for the trial guilt phase, was ineffective for sentencing. There was no discussion of the possible range of sentence for a conviction on the possession charge with a prior felony conviction. Hence, the sentence for possession with one prior felony was vacated.

**Alejandro v. Harrison, 223 Ariz. 21, 219 P.3d 231 (CA 1 2009)**

Defendant was charged with six different crimes as a result of his burglary of a business and subsequent flight from police. On the day of trial he offered to plead unconditionally to three of the charges. The state objected arguing it had a right to try defendant on all charges. The trial court sustained the state's objection.

On special action review the court found nothing in Ariz. R. Crim. Pro. 14.3 and 17.1 which precluded the defendant from pleading unconditionally to the three charges. The court held that if a defendant's unconditional offer to plead guilty to charges is voluntary and intelligent with a factual basis, the state cannot object or otherwise impede the court's acceptance of such plea.

**State v. Aragon, 221 Ariz. 88, 210 P.3d 1259 (CA 2 2009)**

Defendant was convicted of aggravated DUI and sentenced to imprisonment. On appeal the court was faced with the defendant's contention he was denied his counsel of choice when the trial court refused his request for substitute retained counsel shortly before trial.

The court found the trial court erred in not allowing substitution of privately retained counsel. It concluded that defendant had a fundamental right to counsel of choice under the Sixth amendment to the federal constitution. While a court under certain

circumstances may deny substitution under Ariz. R. Crim. Pro. 6.3 (c), this was not such a situation as there had been no prior requests for continuances. The convictions and sentences were reversed.

**Campbell v. Barton, 222 Ariz. 414, 215 P.3d 388 (CA 1 2009)**

Defendant filed a timely notice of change of judge under Rule 10.2, Ariz. R. Crim. Pro. The notice was honored by the trial court. Later the state filed capital allegations against the defendant. Once again the defendant filed a timely notice under Rule 10.2 as it pertained to capital cases. The trial court denied the notice reasoning that a defendant is only allowed one 10.2 notice.

On special action review the court reversed the trial court's ruling. It held that the rule specifically allows a capital defendant the right of a 10.2 notice, regardless whether a non-capital notice had been previously filed. It found the rule accords capital cases different treatment and thus the second notice was proper.

**Francis v. Sanders, 222 Ariz. 423, 215 P.3d 397 (CA 1 2009)**

Defendant was charged by indictment with seven counts of attempted trafficking in stolen property. He challenged the indictment under Rule 12.9, Ariz. R. Crim. Pro. He claimed that the grand jurors were misled as to their ability to consider entrapment upon their inquiry and that the grand jurors were misinformed of the elements of entrapment. The trial court denied the request to dismiss or remand.

On special action review the court found error in the limitation of inquiry by the grand jurors. It held that a grand jury could appropriately consider the law of entrapment in such an inquiry if they choose to inquire. Further, the prosecutor misstated the elements of entrapment when it was implied that coercion was an element of entrapment. The court remanded for a redetermination of probable cause.

**State v. Tillmon, 222 Ariz. 452, 216 P.3d 1198 (CA 1 2009)**

Defendant was charged with one count of transportation of marijuana for sale. He filed a pretrial motion to suppress evidence under Rule 16.1, Ariz. R. Crim. Pro. The motion was filed 20 days before trial. The trial court *sua sponte* denied the motion as untimely.

On review the court held that the motion was timely. It found the trial court required that the motion be filed more than 20 days before trial while the rule only



required that such a motion be filed no later than 20 days before trial. The matter was remanded for the trial court to rule on the motion to suppress.

**State v. Musgrove, 223 Ariz. 164, 221 P.3d 43 (CA 2 2009)**

Defendant was tried on charges of first degree murder and conspiracy to commit first degree murder. The defendant moved for a judgment of acquittal under Rule 20, Ariz. R. Crim. Pro., on the conspiracy count. The state submitted the issue on the evidence without argument. The trial court then acquitted defendant on the conspiracy count citing a lack of substantial evidence. The state then claimed surprise and urged the court to reconsider. The state then argued its response and the court on reconsideration reversed itself and denied the Rule 20 motion.

On appeal the court reversed the trial court on its Rule 20 reconsideration. It held that the transcript and minute entry clearly reflected the court had granted an acquittal. At that point it could not reconsider. Double jeopardy had attached. The conspiracy conviction was vacated.

**Jimenez v. Quarterman, \_\_\_\_ U.S. \_\_\_\_, 129 S.Ct. 681,  
172 L.Ed.2d 475 (2009)**

The Court reviewed a dismissal of a federal habeas petition filed by defendant. The procedural history of the case revealed that at some point the defendant was granted a delayed or out-of-time appeal by the state courts. Consequently, the issue arose whether his federal habeas petition had been timely filed within the one year statute of limitations. The federal lower courts reasoned the habeas petition was untimely.

The Court found that the petition was timely. It held that once the state allowed a delayed or out-of-time appeal, then the statute of limitations time was reset from that date. Accordingly, the petition was timely filed under the reset date.

### **III. Evidentiary Criminal Law**

**State v. Zamora, 220 Ariz. 63, 202 P.3d 528 (CA 1 2009)**

Defendant was charged with criminal trespass. Defendant was questioned when first contacted by police and after his arrest. He was not given *Miranda* advisements when he was first contacted by the police and he was clearly not free to leave. He was

provided *Miranda* advisements after he was arrested and his statements were the same as he made before being arrested. His pre and post *Miranda* statements were admitted at trial.

On review after conviction the court found the trial court record lacking in factual determinations as to the defendant's custody status before he was advised of his *Miranda* rights. It remanded for further factual findings to determine whether the two-stage custodial interrogation was intended to avoid the purpose of the *Miranda* warnings and thus make the defendant's statements inadmissible under Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

### **State v. Fish, 222 Ariz. 109, 213 P.3d 258 (CA 1 2009)**

Defendant was charged and convicted of second degree murder. Defendant shot the victim after victim's dogs were approaching the defendant in a perceived threatening manner. The defendant perceived the victim to be threatening him due to defendant's firing warning shots at the victim's dogs.

At issue on appeal were trial court rulings limiting evidence under Rule 404 (a) (2) and (b) of the Ariz. R. Evid., and trial court's refusal to expand the meaning of "unlawful physical force" in the self-defense instruction given the jury.

The court held that the trial court erred in disallowing specific acts of the victim's violence when confronted about his dogs, even if the defendant was unaware of the acts. The court limited its holding to the unique nature of the facts of the case. Further, the court found error in the trial court's refusal to expand and clarify the type of conduct which could be "unlawful physical force."

### **State v. Larson, 222 Ariz. 341, 214 P.3d 429 (CA 1 2009)**

Defendant was charged with a variety of crimes against children. At issue in the case was his conviction for sexual conduct with a minor, A.R.S. 13-1405 (2001), as a lesser included offense of continuous sexual abuse of a child, A.R.S. 13-1417 (2001).

The court held that the elements of sexual conduct with a minor are not encompassed within the elements of continuous sexual abuse of a child. Further, the court held that sexual conduct with a minor could not be a lesser included offense under the "charging documents" test either. The court found that the continuous sexual abuse statute clearly required that other sexual offenses against the victim be charged in the alternative as a separate offense.

**State v. Canales, 222 Ariz. 493, 217 P.3d 836 (CA 2 2009)**

Defendant was charged with DUI. He moved to dismiss the charge on the claim that the police lacked reasonable suspicion to detain him. The trial court granted the motion. The state appealed.

On appeal the court affirmed the dismissal. The court found the facts insufficient to justify a reasonable suspicion of criminal activity and that the blocking of the defendant's car by a police patrol vehicle amounted to a seizure without reasonable suspicion. The court found the anonymous tip of suspicious activity in the apartment complex parking lot unreliable upon which to justify detention and seizure of defendant.

**State v. Archibeque, 223 Ariz. 231, 221 P.3d 1045 (CA 1 2009)**

Defendant was charged with several counts of molestation and sexual conduct with a minor. The incidents related to contacts with his stepdaughter. The basis for the charges was premised on statements defendant made to his wife and a Bishop from his church. The defendant motioned to suppress his statements under the penitent and clergy privilege of A.R.S. 13-4062(3). The court suppressed all statements. The state appealed.

On appeal the court affirmed the trial court's ruling. It found the clergy-penitent privilege applied. Further, under the facts it did not find waiver by defendant's wife's presence during the communications with the Bishop.

**Arizona v. Gant, \_\_\_\_ U.S. \_\_\_\_, 129 S.Ct. 1710,  
173 L.Ed.2d 485 (2009)**

The Supreme Court reviewed on *certiorari* the Arizona Supreme Court's decision on the defendant's conviction and whether he had been subjected to an illegal search under the fourth amendment to the Federal Constitution.

The court upheld the holding of the Arizona Supreme Court that the search of defendant's vehicle while he was handcuffed in a patrol car was unreasonable under the Fourth Amendment. The court further held that it was not bound by the doctrine of *stare decisis* to adhere to broad and expansive readings of its decision in **New York v. Belton**, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981). The court rejected the state's arguments that the police needed a bright-line rule to allow access to an arrested person's vehicle due to the limited privacy interests an individual has in their vehicle.

**Melendez-Diaz v. Massachusetts, \_\_\_\_ U.S. \_\_\_\_, 129 S.Ct. 2527,  
174 L.Ed.2d 314 (2009)**

The Supreme Court reviewed on *certiorari* a Massachusetts Appeals Court ruling that held that admission of lab analysis certificates in a criminal trial as to the identity of a suspected drug was not in violation of the defendant's confrontation rights under the Sixth Amendment of the Federal Constitution.

The Court held that the certificates were testimonial in nature and thus subject to exclusion under its holding in **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d. 177 (2004). The court did not believe the certificates were exempted from **Crawford's** mandate due to theories that lab analysts were not conventional witnesses, nor "accusatory" witnesses, or that their testimony was neutral, scientific testing, or akin to official or business records. Further, a defendant's ability to subpoena the analysts did not obviate the state's obligation to produce the analysts for cross-examination at trial.

#### **IV. Sentencing Decisions**

**State v. Botkin, 221 Ariz. 1, 209 P.3d 137 (2009)**

The court reviewed the trial court's grant of probation after a defendant pled guilty to a new charge committed while on intensive probation. At issue was whether the trial court could transfer defendant to supervised probation from intensive probation before finding a violation of probation so as to preclude the possibility of automatic revocation of probation and imposition of a term of imprisonment.

The court reviewed A.R.S. 13-917(B). The statute required revocation of intensive probation and imposition of a term of imprisonment if the defendant had committed an additional felony offense or violated a condition of probation which posed a serious threat or danger to the community. The court held that A.R.S. 13-917 (A) allowed a trial court to transfer a probationer from intensive probation to supervised probation "at any time." The trial court's actions were consistent with the statute when it transferred defendant from intensive probation to supervised probation before a finding of violation of intensive probation. There was no abuse of discretion.



**State v. Slover, 220 Ariz. 239, 204 P.3d 1088 (CA 2 2009)**

Defendant was convicted of negligent homicide. At sentencing the trial court ordered the defendant to pay the victim's wife's attorneys fees. The fees were incurred by the victim's wife in assisting the state in pursuing the case.

On appeal the court found that the attorney fees were incurred due to the victim's attorney's role as an adjunct prosecutor, prodding the state to pursue the case and apparently assisting it with the prosecution. The court held that the fees were not incurred as a direct result of the offenses the defendant committed. The tasks performed were actually the state's responsibility. Hence, the fees were consequential damages not recoverable as restitution

**State v. Norris, 221 Ariz. 158, 211 P.3d 36 (CA 2 2009)**

Defendant's state burglary conviction sentence was enhanced by a federal conviction for possession with intent to distribute marijuana. He appealed claiming the federal conviction was not a historical prior as the elements for the federal crime did not parallel the corresponding state offense. Specifically, he claimed that the state offense *mens rea* differed from the federal offense.

The court agreed with defendant's claim. It found that the state offense of sale of marijuana required the element of "knowingly." The federal offense did not. Consequently the federal offense, as a foreign conviction, could not be used to enhance the defendant's state burglary conviction. The sentence was vacated.

**State v. Provenzano, 221 Ariz. 364, 212 P.3d 56 (CA 1 2009)**

The defendant was sentenced to enhanced sentences for forgery convictions.

The court on appeal reviewed the propriety of the prior convictions as aggravators and enhancers. The court held that the multiple prior convictions would only amount to one aggravating circumstance for range enhancement purposes. While the multiple convictions could properly be used to enhance the sentence range to a repetitive status, the court found the trial court erroneously used a stale prior felony to enhance to the repetitive range. The case was remanded for resentencing and a proper use of a prior conviction for repetitive enhancement.

**State v. Lewandowski, 220 Ariz. 531, 207 P.3d 784 (CA 2 2009)**

Defendant was convicted of various drug offenses. At sentencing the trial court imposed a criminal restitution order pursuant to A.R.S. 13-805.

On appeal the court found the restitution order an illegal sentence. It concluded that criminal restitution orders under A.R.S. 13-805 can only be entered after a person's term of imprisonment or probation has expired. It reasoned that the accrual of interest upon the entering of a criminal restitution order exacts an additional penalty upon a defendant not authorized by law.

**State v. Streck, 221 Ariz. 306, 211 P.3d 1290 (CA 2 2009)**

Defendant was convicted of theft of means of transportation – a tractor. On appeal he challenged the trial court's allowance of \$113.77 for expenses incurred traveling from Texas to Arizona to investigate the missing tractor.

The appeals court agreed with defendant that the travel costs for investigation were not recoverable under its decision in Slover. Thus, the investigation costs were disallowed.

**State v. Chacon, 221 Ariz. 523, 212 P.3d 861 (CA 1 2009)**

Defendant's probation was revoked by the trial court. On appeal defendant challenged the revocation on jurisdictional grounds.

The appeals court found that though the petitions to revoke probation were signed by the appropriate people before defendant's probation was set to expire, they were not filed by the clerk until after the probation expired. Consequently, it held the trial court had no jurisdiction to revoke defendant's probation as the probation had expired.

**State v. Geeslin, 221 Ariz. 574, 212 P.3d 912 (CA 1 2009)  
( review granted 12/01/09)**

Defendant was convicted of a variety of felony offenses resulting from a shoplifting spree. At sentencing the trial court imposed repetitive sentences as the defendant "informally" admitted having prior felonies. Defendant appealed.

The court vacated the trial court's repetitive sentences. It found there was not formal finding by the trial court of defendant's prior offenses. There was not even a colloquy where the court addressed the defendant to ascertain the prior convictions. The matter was remanded for resentencing and a determination of whether defendant was prejudiced by the trial court's error.

**State v. Diaz, 222 Ariz. 188, 213 P.3d 337 (CA 2 2009)**  
**( review granted 2/04/10)**

Defendant was convicted of one count of possession of methamphetamine for sale, more than nine grams, and sentenced to an aggravated term of 25 years imprisonment due to two historical prior convictions. Defendant appealed.

On appeal the court vacated his sentence. It held that he should have been sentenced under A.R.S. 13-712 rather than a repeat offender under A.R.S. 13-604 (D). The court acknowledged that the sentencing range under 13-712 was more lenient, but it held the plain language of the substantive offense statute, 13—3407 (E), required sentencing under 13-712 rather than the repetitive sentencing schemes of 13-604.

**State v. Perrin, 222 Ariz. 375, 214 P.3d 1016 (CA 2 2009)**

Defendant pled guilty to vehicular manslaughter and related charges. He was sentenced to super aggravated term of imprisonment for the manslaughter conviction. The court imposed a super aggravated sentence on the basis of one statutorily enumerated aggravator and two "catch all" aggravators. Defendant sought postconviction review.

On review the court set aside the super aggravated term for the manslaughter conviction. The court found such a sentence violated the supreme court's holding in **State v. Schmidt**, 220 Ariz. 563, 208 P.3d 214 (2009), that the "catch all" aggravator was unconstitutional. The court overruled its precedent in **State v. Soto-Perez**, 192 Ariz. 566, 968 P.2d 1051 (CA 2 1998) noting that the holding there predated the United States Supreme Court decisions in **Apprendi** and **Blakely** which announced constitutional safeguards in sentencings beyond a presumptive range of imprisonment.

**Kaufman v. Cruikshank/State, 222 Ariz. 488, 217 P.3d 438**  
**(CA2 2009)**

A request by a defense attorney for an Order to Show Cause why a prosecutor and its office should not be held in contempt was dismissed by the trial court. The motion sought relief for the prosecution's alleged failure to notify the defense attorney of the

disclosure of a statement of her client inculcating another criminal defendant in a homicide case. The defense attorney claimed the prosecutor's actions placed the client's life in jeopardy. After the motion was dismissed, the prosecutor requested attorney's fees of \$499 as a sanction for the defense attorney's baseless and vexatious petition. The court imposed the sanction.

On special action review the court vacated the sanction order. The court found there was no basis in the rules of criminal procedure or statutes that permitted a court to impose attorney fees as a sanction for alleged bad faith litigation conduct.

**State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069 (CA 2 2009)**

The defendant was sentenced for several offenses following trial and pleas. The court imposed a slightly aggravated sentence for one of the theft convictions relying upon a catch all aggravator of A.R.S. 13-702 applicable at the time of his sentencing. Defendant appealed.

On appeal the court vacated the aggravated sentence. It followed the holding of **State v. Schmidt**, 220 Ariz. 563, 208 P.3d 214 (2009), and found the imposition of an aggravated sentence only on the basis of an alleged "catch all" aggravator was an illegal sentence.

**Harbison v. Bell, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1481,  
173 L.Ed.2d 347 (2009)**

The Court addressed the authority of a federally appointed counsel in a federal habeas proceeding to represent a state prisoner seeking clemency from a death sentence in state proceedings. The court held that 18 U.S.C. 3599 explicitly authorizes a federally appointed counsel to continue duties under the appointment of representing a state habeas petitioner in state clemency proceedings even though there was no federal involvement in the clemency review proceedings.

**Cone v. Bell, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009)**

The Court reviewed a defendant's death sentence from a Tennessee state prosecution. At issue was suppression of information about the defendant's drug abuse problem. At trial the prosecution presented testimony from witnesses that defendant was not a drug abuser to rebut defendant's insanity defense. Rather, the state asserted, he was a calculating, intelligent criminal fully in control of his decisions and actions at the time of the crimes.



The court found that the prosecution had information that it did not disclose that revealed the defendant was impaired at the time of the crimes. The evidence was from eyewitnesses who had observed his behavior at the time periods immediately before and after the crimes. The court held that the suppression of the information was a violation of **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The information suppressed was material to defendant's sentence proceedings. The death sentence was vacated and the case remanded for further proceedings on defendant's claim that his death sentence was invalid due to the materiality of the suppressed evidence.

**Scott v. Schriro, 567 F.3d 573 (9<sup>th</sup> Cir. 2009)**

The defendant's capital convictions and resulting death sentence were reviewed by the court. It remanded for an evidentiary hearing in the district court on his claim of ineffective assistance of counsel. The court held that failure of counsel to investigate and present evidence of defendant's history of traumatic head injuries and their effect on his mental processes could be grounds for vacating the death sentence.

**Schad v. Ryan, 581 F.3d 1019 (9<sup>th</sup> Cir. 2009)**

The court reviewed defendant's claims for habeas corpus relief from his death sentence. The court was presented with information not presented in state court proceedings concerning the effects of child abuse upon defendant. The court remanded the case to federal district court to determine whether defendant had even attempted to present such evidence in state court. If so, then his claims of ineffective assistance as to such evidence could be reviewed.

**Nash v. Ryan, 581 F.3d 1048 (9<sup>th</sup> Cir. 2009)**

The court held that a habeas corpus petitioner has a statutory right to be competent so as to assist his counsel on an appeal of a habeas corpus denial. The court found that the evidence before it established the petitioner's incompetence due to medical and other disabilities and remanded for a full competency determination. The court reasoned that his claims for habeas relief required a rational discussion with his appointed counsel to properly evaluate and present his claims.

**Libberton v. Ryan, 583 F.3d 1147 (9<sup>th</sup> Cir. 2009)**

The court reviewed defendant's capital conviction and sentence of death from 1981. It found that significant testimony of family and friends as to defendant's character, history of being a victim of child abuse and being a follower would have presented a

reasonable probability that the trial judge would have imposed a sentence less than death. The case was remanded to state court for resentencing.

**Jones v. Ryan, 583 F.3d 626 (9<sup>th</sup> Cir. 2009)**

The court reviewed defendant's capital conviction and sentence of death from 1992. The court was presented with evidence that defendant's significant neurological impairment was not properly evaluated and presented as mitigation in his sentencing proceedings. The court found the defense's reliance on a court appointed expert for mitigation was not sufficient for presentation of mitigation. Further, testimony from family members should have been developed by the defense and presented. The court vacated the sentence of death and remanded to state court for resentencing.